



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2011

Ms. Hyattye Simmons  
General Counsel  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR2011 - 04105

Dear Ms. Simmons:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412353 (DART ORR 7919).

The Dallas Area Rapid Transit ("DART") received a request for information related to DART's compliance with applicable state and local laws related to "procurement solicitations" and communications related to a specified previous request and the present request. DART received a second request from the same requestor for information related to DART's review and processing of the specified previous request. You state DART has released some of the requested information to the requestor. You claim some of the requested information is excepted from disclosure under section 552.107 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note a portion of the first request seeks information created in response to the present request. Such information would be created after the date the request was received.

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<sup>1</sup>Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision No. 676 at 102 (2002).

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002,.021,.227,.351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by the present requests consists of documents DART maintained or had a right of access to as of the date that it received these requests.

You inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-03108 (2011). In that ruling, we found DART may withhold some of the requested information under section 552.104 of the Government Code and must release the remaining information. We conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, DART may continue to rely on that ruling as a previous determination and withhold or release the requested information at issue in accordance with Open Records Letter No. 2011-03108. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note you have submitted an unredacted copy of DART's letter to this office requesting a decision on the specified previous request. However, you submitted this letter as a supporting document. Further, in correspondence to the requestor you state "DART is not required by the [Act] to provide [the requestor] an unredacted copy [of this letter]." However, you have not provided any arguments or cited any exceptions to withhold the unredacted letter related to the specified previous request. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). Additionally, the information you have redacted from this letter does not reveal information this office ruled may be withheld in Open Records Letter No. 2011-03108. Thus, we find DART must release an unredacted copy of this letter.

You claim the information submitted as Exhibit C is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must

demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies to only a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information in Exhibit C constitutes e-mails and their attachments that were sent amongst DART attorneys, legal staff, and employees for the purpose of providing legal services to DART regarding the specified previous request. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find DART may generally withhold Exhibit C under section 552.107(1) of the Government Code. However, we note one of individual e-mails and its attachment in an otherwise privileged e-mail chain was sent to an individual who is not a privileged party. Accordingly, to the extent this e-mail and its attachment, which we have marked, exist separate and apart from the submitted e-mail chain, the non-privileged e-mail and attachment may not be withheld under section 552.107.

We note the non-privileged e-mail contains an e-mail address of a member of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body[.]” unless the member of the public consents to its release or the e-mail

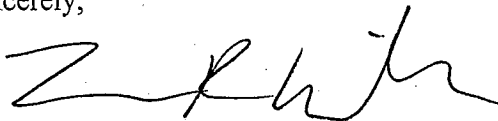
address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). The e-mail address we marked is not the type excluded by subsection (c). Accordingly, unless the owner of the e-mail address we marked consents to its release, DART must withhold this e-mail address under section 552.137.<sup>3</sup>

In summary, as we have no indication that the law, facts, and circumstances on which Open Records Letter No. 2011-03108 was based have changed, DART may continue to rely on that ruling as a previous determination and withhold or release the requested information at issue in accordance with it. DART may withhold Exhibit B under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mail and its attachment, which we have marked, exist separate and apart from the otherwise privileged e-mail chain, DART may not withhold it under section 552.107 of the Government Code. In that event, DART must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner consents to its disclosure. DART must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/tf

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<sup>3</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 412353

Enc. Submitted documents

c: Requestor  
(w/o enclosures)